

MOUNTAIN HOME HIGHWAY DISTRICT

IBLA 98-353

Decided January 21, 1999

Appeal from a decision of the Manager, Snake River Birds of Prey National Conservation Area, Bureau of Land Management, denying right-of-way application IDI-32600. EA No. 95059.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision rejecting a right-of-way application for a road building project, filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976-- Rules of Practice: Appeals: Burden of Proof

The burden is on a right-of-way applicant, who appeals a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM erred in the collection or evaluation of data supporting the rejection of the right-of-way. The applicant's claim that the road would not be inconsistent with the purposes for which the Snake River Birds of Prey National Conservation Area was established does not establish error in the grant, when the decision was based not only on the EA, but on a use analysis showing that denying the application would not adversely affect Appellant because of existing alternative routes to the proposed access road.

APPEARANCES: Jay R. Friedly, Esq., Hall, Friedly & Ward, Mountain Home, Idaho, for Appellant; Kenneth M. Sebby, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Mountain Home Highway District (Mountain Home or Appellant) has appealed from a May 6, 1998, decision issued by the Manager, Snake River Birds of Prey National Conservation Area (NCA), Bureau of Land Management (BLM), denying right-of-way application IDI-32600 for an access road to facilitate expansion of Simplot Livestock Company's feed lot in Mountain Home, Idaho. The NCA Manager based his decision on Environmental Assessment (EA) No. 95059 and on a use analysis in which existing alternate routes were determined to be available.

On March 27, 1998, Mountain Home filed a right-of-way application with BLM seeking approval to develop the following improvements across BLM land:

Project will consist of construction and maintenance of roads to facilitate expansion of Simplot's feedlot. This would be a year round road, construction to begin as soon as Conditional Use Permit is granted to Simplot from Elmore County Planning and Zoning Commission. The road across BLM will improve an existing road of about 3075 ft. diagonal across the N1/4 of Sec. 28, and then 2640 ft. along the East/West line to the East Quarter corner of Sec. 29. The width to be 60 ft.

In its application, Appellant claimed that there were "[n]o other reasonable routes that will reroute trucks from Grand View Highway and other roads." (Application at 2.) In the statement of need for the project within the application, Appellant stated: "The new road would be used to reroute trucks away from the Grand View Highway. This will greatly improve public safety and alleviate some highway maintenance costs." (Application at 2.) In its evaluation of the environmental impacts within the application, Appellant claimed only "[s]hort term effects during construction." (Application at 2.)

In his decision, the NCA Manager determined, in pertinent part:

Our records reveal that on January 31, 1995, Simplot (dba Grandview Farms), applied (IDI-31018) for a road right-of-way that followed a similar alignment to your proposal. In accordance with 43 CFR 2802.5(d)(1), an Environmental Analysis of Simplot's application was completed on November 2, 1995. The Environmental Analysis determined that the following special status plants would be adversely affected: Esteve False Yarrow, White-margined Wax Plant, and Smooth Malacotrix. In addition, the proposed road was located within known golden eagle nesting territory.

Per 43 CFR 2802.4(a)(1), an application may be denied if the authorized officer determines that the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed. Further, section 4(a)(2) of Public Law 103-64 (107 Stat. 302) provides that the Secretary of the Interior will allow only such uses of lands in the NCA that will further the purposes for which the NCA was established.

Our analysis of the Simplot application indicated that their proposed road would have an adverse on special status plant species. And further, that such land was incompatible with the intent of the law that established the NCA.

The Simplot application was denied based on unacceptable impacts that such a road would have on NCA lands. Because your proposal will have the same negative impacts on special status plants and animals, and is also inconsistent with the purpose for which the public lands are managed, your application is also denied.

(Decision at 1-2.)

On appeal, Appellant disputes the analysis provided by the NCA Manager and claims:

1. The application of the Mountain Home Highway District proposes to improve an already existing road, not construct a new road. The existing road has been in place for many years prior to the creation of the Snake River National conservation Area.

2. Because the application proposes to improve a[n] already existing road, there would be no increased adverse impacts on special status plants, particularly, Esteve False Yarrow, White-margined Wax Plant or Smooth Malacothrix. These plants are not now growing in the existing roadway. The improvement of the road would require very little additional land.

3. The location of the existing road is near a public highway and would have very little additional impact on the Snake River Birds of Prey National conservation Area.

4. The improvement of the existing road would allow the use of the road by trucks hauling manure from Simplot Livestock. This would remove this traffic from the nearby Grandview Highway and would thus alleviate a potential traffic and environmental hazard from the highway, which would be in the public interest.

5. The proposed improvement of the existing road would not be inconsistent with the purposes for which the Snake River Birds

of Prey National Conservation Area was established. The proposed improvement of the road will have very little impact on the NCA.

(Statement of Reasons at 1-2.)

In response, BLM states that the "existing road" Appellant refers to is a two-track desert trail that has been used infrequently and without authorization as a short-cut through the area by employees of the Simplot Livestock Company feedlot, local farmers, and ranchers. (Answer at 2.) While the existing trail averages approximately 8 feet in width, BLM claims, the proposal would require a 60-foot wide right-of-way area, 30 feet of which would have been built up, graveled or paved, with barrow pits and drainage culverts installed on either side. Id. BLM states that the substantial construction contemplated by the proposal must necessarily be considered new construction, and that any other conclusion would be unreasonable and not reflective of the impacts on the NCA. (Answer at 2-3.) BLM claims that its analysis led to a determination that granting the proposed right-of-way would intensify human use and disturbance of this area, and, therefore, was contrary to both the purpose and intent of Public Law 103-64 (the Act), which established the NCA on August 4, 1993, and which precludes unwarranted and unnecessary use and development of the NCA. (Answer at 3.) BLM quotes from the Act at section 3(a)(2) in explaining that the NCA was established "to provide for the conservation, protection, and enhancement of raptor populations and habitats and the natural and environmental resources and values associated therewith, and of the scientific, cultural, and educational resources and values of the public lands in the conservation area." Id. Further BLM notes, section 4(a)(2) of the Act provides that "the Secretary shall allow only such uses of lands in the conservation area as the Secretary determines will further the purposes for which the Conservation Area is established." (Answer at 3.)

In response to Appellant's claim that, because the application proposes to improve an existing road, there would be no increased adverse impacts on special status plants, BLM found that a significant widening could very well impact specific plants. BLM determined that in addition to the surface areas disturbed in any construction, the general area would also be subjected to an increased amount of human intrusion, which would affect sensitive plants that might inhabit areas adjacent to the road. (Answer at 4.) In this regard, BLM states, increased human use of the area would also increase the wildfire potential, a real concern since 72 percent of the average 19 wildfires per year (since 1980) in the NCA are human caused. Id. Such wildfires, BLM argues, adversely impact raptor prey shrub habitat and directly impact populations of raptor prey and golden eagles and prairie falcons. Id.

With regard to Appellant's claim that the proposed road is adjacent to an existing highway and would have very little additional impact, BLM disagrees. BLM advises that one of the issues considered in denying Appellant's application was that public roads already exist in sufficient

location and number to satisfy the ingress and egress requirements of the Simplot Livestock Company feedlot. (Answer at 5.) BLM lists, for example, State Highway 67 (Grandview Highway) and existing paved county roads Bennett Road, Whitted Road and Collett Road, all of which currently provide ingress to and egress from the feedlot. Id. BLM claims that additional roads are neither required nor necessary, and that an intrusion of this kind is incompatible with the purposes for which the NCA was established. Id.

In response to Appellant's claim that granting the right-of-way would remove manure-hauling trucks from the Grandview Highway and thus alleviate an environmental hazard from the highway, BLM questions how the public interest would be served by placing an environmental hazard on public land.

(Answer at 6.) BLM notes that in addition to other paved county roads in the area which could be used, Simplot Livestock Company currently owns a significant amount of private land adjacent to the feedlot and away from the NCA on which they could construct a new road for ingress and egress purposes. Id.

Finally, BLM disagrees with Appellant's claim that the proposed road would not be inconsistent with the purposes for which the NCA was established or that the road would have very little impact on the NCA. BLM urges that Appellant has provided no facts that would controvert BLM's findings that the road is unnecessary or that land disturbance would result in the direct loss of an additional 6.82 acres of valuable wildlife habitat. (Answer at 6.) In addition, BLM claims, the proposed road could also cause potential impacts to sensitive plants, resident nesting golden eagles, and critical shrub habitat. (Answer at 7.)

[1] As the authorized representative of the Secretary of the Interior, BLM has the discretion to accept or reject a right-of-way application for a proposed road-building project filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988). Kenneth Knight, 129 IBLA 182, 183 (1994); C.B. Slabaugh, 116 IBLA 63, 65 (1990); Eugene V. Vogel, 52 IBLA 280, 283, 88 I.D. 258, 259 (1981). A BLM decision rejecting such an application will be affirmed where the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Kenneth Knight, supra.

[2] The burden is on Appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in the field in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of the road building proposed by the applicant, and has researched and balanced the anticipated environmental consequences with other considerations, it is not enough that Appellant

offers a contrary opinion. In order to prevail, Appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating its data or reaching its conclusions. King's Meadows Ranches, supra at 342.

To determine whether a BLM decision rejecting a right-of-way application was based on a reasoned analysis of the facts and was made with due regard for the public interest, the Board looks to the impacts anticipated from the proposal as those impacts are evaluated in the EA. 1/

The EA states that the proposed action and alternatives were analyzed with specific emphasis on the existing environment, botanical impacts, and wildlife impacts. (EA at 1-2.) Alternatives to the proposal include denying the application (selected alternative) and requiring the road to be placed elsewhere.

The area affected by the alternatives considered by BLM is located in Elmore County in the Boise District of the Bruneau Resource Area, Idaho. The area is just inside the southern boundary of the Snake River Birds of Prey NCA. The terrain slopes south and westward toward the Snake River just under the bluff that was included in the original Birds of Prey Essential Nesting Area. The site has been burned in the past. Now, besides Cheatgrass, Mustard and Greasewood, the sensitive species of plants described above inhabit the area. Lizards are abundant and evidence of owls is present. The area is set aside for the raptors that are known to inhabit the area. (EA at 1.)

The EA indicates that BLM has reviewed the proposed action and the alternatives in the context of the Bruneau-Kuna Resource Management Plan as required by 43 C.F.R. § 1610.5 and BLM 1617.3. (EA at 2.) The NCA Manager further determined that the proposed action is subject to FLPMA as the proposed road improvement and bridge will cause new surface disturbance beyond what currently exists associated with the two-track desert trail. See EA Title Page. In its review of environmental concerns, BLM determined that there would be no known impacts for either the proposed action or either alternative with respect to the critical elements listed as areas of critical environmental concern, prime or unique farm land, floodplains, Native American religious concerns, hazardous substances or solid wastes, water quality concerns, wetlands/riparian zones, wild and scenic rivers, wilderness study areas, and wild horse herd management areas. See EA Face Sheet.

The EA determined that the proposed action would traverse 1/4 mile into the NCA to less than 1/2 mile from the rimrock used by the raptors. It then traverses west for 1 mile to a corner of other property owned by Simplot. The EA determined that the traffic on this proposed road would create enough activity to prevent the raptors from using the 80-acre parcel

1/ The EA in this case was prepared for a nearly identical request by Simplot Livestock Company in 1995, for road construction over the same route as proposed by Appellant. While a new EA was not prepared, we find that the EA prepared in 1995 fairly addresses the current application.

of the NCA that would be completely surrounded by Simplot's stockyards, the proposed road, and 1/4 mile of other private land. The EA determined that during construction of the graveled road, dust would decrease air quality every time a truck traversed the site. (EA at 2.)

With respect to botany, the EA determined that the proposed action would impact three sensitive species in the District: (1) *Chaenactis stevioides* (Esteve false yarrow), a "priority 1" species by the Idaho Native Plant Society (INPS) and on the Idaho BLM Sensitive Plant List; (2) *Glyptopleura marginata* (White- margined wax plant), named a "sensitive" species by both the INPS and the Idaho BLM; and (3) *Malacothrix glabrata* (Smooth malacothrix), a special status plant in Idaho for the last 10 years. Smooth malacothrix was listed as a "monitor" species by the INPS in the 1994 Conservation Data Center report, and has been on the Idaho BLM Sensitive Plant List since the mid-1980's. (EA at 2.) The EA further found that any location in this area has the potential of impacting these or approximately 10 other sensitive species as well. Id.

The only known cultural phenomenon to be impacted under the proposed alternative is an historic can and bottle scatter that is not eligible for listing. (EA at 2.)

The analysis of wildlife in the area encompassed by the proposed action found that the road, as proposed, intrudes into the nesting territory of a pair of Golden Eagles. The EA found that the guidance for protection of raptors in the Act of August 4, 1993, Public Law 103-64, quoted above, establishing the NCA, makes the proposed road incompatible with the intent of this law. (EA at 2.)

In addressing the relative impacts of the no-action and alternate location alternatives on these respective values, the EA determined that to deny the application would not cause any environmental impacts, while to authorize relocation at another site in this area, if that were later requested, would cause similar impacts to those described for the proposed action. See EA at 2.

We find that the EA demonstrates that "a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable" and that BLM correctly determined an environmental impact statement was not necessary. We believe BLM's analysis of the environmental impacts from the project was comprehensive and its selection of the no-action alternative, as well as its conclusion that the impacts, as the proposed action is designed, cannot be justified because the road is not necessary, is correct.

We find BLM's determination that the proposed action is not necessary to be a reasonable one because the existing road matrix of county routes offers alternatives to the Grandview Highway as egress and ingress routes to the Simplot feedlot. We are not persuaded that BLM overlooked significant impacts in properly concluding that the no-action alternative represented a more satisfactory choice than either the proposed action or the

selection of another route. The fact that the no-action alternative was selected does not automatically make its choice erroneous. See Glacier-Two Medicine Alliance, 88 IBLA 143, 144 (1985).

In sum, we conclude Appellant has not met its burden of showing that BLM's determination is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The grant or denial of the right-of-way application was within the discretion of the NCA Manager in this case. The Manager relied on the EA in making his determination to reject the right-of-way, and the decision was supportable and reasonable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

David L. Hughes
Administrative Judge